RECENT CASE NOTES

ADMIRALTY—JONES ACT—ELECTION OF REMEDIES.—The plaintiff, a seaman injured on the defendant's vessel, recovered wages, maintenance and cure, and then sued at law for damages under section 33 of the Jones Act [41 STAT. 988 (1920), 46 U. S. C. § 688 (1926)]. Judgment was given for the plaintiff. *Held,* on *certiorari* to the Supreme Court, that recovery in an action for wages, maintenance and cure was no bar to this action. Judgment affirmed. *The Admiral Dewey: Pacific S. S. Co. v. Peterson,* 49 Sup. Ct. 75 (U. S. 1928).

The right of an injured seaman to wages, maintenance and cure, regardless of negligence, is one of the established doctrines of admiralty. *Harden v. Gordon,* Fed. Cas. No. 6047 (C. C. D. Me. 1823); *The Osceola,* 189 U. S. 158, 23 Sup. Ct. 483 (1903). There is also the right to indemnity where the injury is caused by the unseaworthiness of the vessel or defective appliances. *Carlisle Packing Co. v. Sandanger,* 259 U. S. 255, 42 Sup. Ct. 475 (1922); *cf.* (1921) 9 CALIF. L. REV. 333. The Jones Act extended to any injured seaman, "at his election," an action at law for damages. See (1926) 20 ILL. L. REV. 156. The admiralty proceeding based on unseaworthiness and the action at law under the Jones Act are mutually exclusive, both being in tort. *West Cape; Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, 46 Sup. Ct. 348 (1927). Prior to the instant case a federal court has held that a seaman, having elected to sue at law under the Jones Act, could not amend to sue in admiralty for wages, maintenance and cure. *Western Front: Kuhlman v. Fletcher Co.,* 20 F. (2d) 465 (C. C. A. 3d, 1927); see *Panama Ry. v. Johnson,* 264 U. S. 375, 380, 44 Sup. Ct. 391, 394 (1924); *Engel v. Davenport,* 271 U. S. 33, 36, 46 Sup. Ct. 410, 412 (1926). But there has also been authority to support the proposition that the right to wages, maintenance and cure arises from the contract of employment and is not indemnitory. See *Harden v. Gordon, supra* at 481; *The A. Heaton,* 43 Fed. 592, 595 (C. C. D. Mass. 1890). The instant case establishes the rule that an action for wages, maintenance and cure sounds in contract and does not exclude a subsequent tort action under the Jones Act.

BILLS AND NOTES—PRESENTMENT AND NOTICE OF DISHONOR—NECESSITY WHERE INDORSER AS OFFICER OF CORPORATION PARTICIPATED IN PREFERENTIAL TRANSFER.—Officers of a corporation, indorsers on its notes, participated in a preferential transfer to the defendant holder and thereby obtained a release of the notes. The plaintiff, trustee for the bankrupt corporation, sued to recover the preference. The defense claimed that the surrender of the paper released the indorsers for failure to make presentment and give notice of dishonor, and that the defendant therefore became a purchaser for value. Judgment was given for the defendant. *Held,* on appeal, that by participating in the preferential payments, the indorsers waived these requirements and the bank was therefore not a purchaser for value since it had not lost its rights against the indorsers, which became reinstated when the preference was set aside. Judgment reversed. *Kollman v. Manufacturers' Trust Co.,* 27 F. (2d) 659 (C. C. A. 2d, 1928).

That an indorser on a corporation's note is a director or officer of the corporation does not *ipso facto* dispense with the necessity of presentment and notice of dishonor. *Keiser v. Butte Creek Consolidated Dredging Co.,*

48 Cal. App. 38, 191 Pac. 552 (1920); *Houser v. Fayssoux*, 168 N. C. 1, 83 S. E. 692 (1914), ANN. CAS. 1917B 835; (1920) 5 MINN. L. REV. 72. But any additional circumstances may be seized upon to find a waiver. *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653 (1893) (indorsers, majority directors, knew that note could not be paid at maturity); *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. Y. Supp. 359 (1st Dep't 1908) (indorser participated in corporation's bankruptcy proceedings); *Bessenger v. Wenzel*, 161 Mich. 61, 125 N. W. 750, 27 L. R. A. (N. S.) 516 (1910) (indorsers assured holder that corporation would not pay note); *Mercer v. Hydrocarbon Converter Co.*, 205 App. Div. 78, 199 N. Y. Supp. 75 (1st Dep't 1923) (indorser sent corporation's renewal note); *Verser v. Sterling Oil & Refining Co.*, 89 Okla. 114, 213 Pac. 863 (1923) (indorser dishonored note on behalf of corporation). Participation in the violation of a preferential transfer statute by an officer, whereby the release of the note was obtained, has been held to constitute a waiver. *Wright v. Bank*, 52 Misc. 214, 103 N. Y. Supp. 548 (Sup. Ct. 1907). But where the indorser was not a director or officer, and not a party to the preferential transaction, the creditor has been held to have lost his rights against the innocent indorser, and thus to have become a purchaser for value. *Wright v. Bank, supra; Perry v. Van Norden Trust Co.*, 192 N. Y. 189, 84 N. E. 804 (1908). Two federal cases, apparently overruled by the instant decision, made the *Perry* case the basis of their decisions where the indorsers controlled the corporation and participated in the preferential transfer. *Howland v. Metropolitan Bank*, 228 Fed. 542 (S. D. N. Y. 1915); *Grandison v. Robertson*, 231 Fed. 785 (C. C. A. 2d, 1916). Regardless of the relationship of director and corporation, such participation would seem to amount to a waiver, for the indorser by his own conduct misled the holder and put him off his guard, thus inducing him to omit the formalities of presentment and notice of dishonor. *Moll v. Roth Co.*, 77 Ore. 593, 152 Pac. 235 (1915); (1925) 9 MINN. L. REV. 279.

CONFLICT OF LAWS—ILLEGAL CONTRACT—LIQUOR EXPORT TO THE UNITED STATES.—Members of a British partnership engaged in shipping liquor to the United States contracted among themselves for loans in furtherance of their enterprise. In an action for breach of contract among them, *held* (one Lord Justice *dissenting*), that the partnership was illegal and the contract between the parties unenforceable, as such action would furnish a just cause of complaint by the United States government. *Foster v. Driscoll*, 45 T. L. R. 185 (1929).

A contract will not be enforced at the forum if it would be illegal in the state of performance. *Paine v. Morris*, 26 Md. 46 (1866); *cf. Ormes v. Dauchy*, 82 N. Y. 443 (1880); *Rosenbaum v. United States Credit-System Co.*, 64 N. J. L. 34, 44 Atl. 966 (1899), *rev'd*, 65 N. J. L. 255, 48 Atl. 237 (1901). And a contract is invalid if in furtherance of a transaction the ultimate purpose of which is to violate the laws of another country. DICEY, CONFLICT OF LAWS (4th ed. 1927) 618; *Walkerville Brewing Co., Ltd. v. Mayrand*, [1928] 4 D. L. R. 500 (lease of a pier in Canada for shipping beer to the United States held illegal). But *cf.* (1929) 42 HARV. L. REV. 436 (contending that the problem is one of proximate causation). Thus courts will not recognize contracts to raise funds for a rebellion against a friendly government. *DeWütz v. Hendricks*, 2 Bing. 314 (1824). And an action on a bond has been barred where it secured payment for goods to be sold illegally in another country. *Lightfoot v. Tenant*, 1 Bos. & P. 551 (1796). The degree of participation in the ultimate illegal transaction may have some bearing on the status of a party to a contract in

furtherance thereof. *Bowman Distilling Co. v. Nutt*, 34 Kan. 724 (1886) (vender of liquor merely knew of vendee's purpose to make illegal resale; action by former not barred); *Gaylord v. Soragen*, 32 Vt. 110 (1859) (liquor packed specially by vendor for illegal resale; action barred); *Lightfoot v. Tenant, supra.* The English cases seem to indicate that an exception to the general rule of invalidity is made where the contract is part of a transaction to violate the revenue laws of a foreign country. DICEY, *loc. cit. supra; Planche v. Fletcher*, 1 Doug. 251 (1779) (insurance of goods smuggled into France is valid); *Simeon v. Bazett*, 2 M. & S. 94 (1813), *aff'd*, 5 Taunt. 824 (1814) (insurance by neutral against risk of seizure by his own government is valid). The above cases, however, involved the evasion of revenue laws and the continental blockade primarily directed by France against British commerce. In the instant case, on the other hand, policy would tend wholly toward giving recognition to the laws of a friendly state.

CONSTITUTIONAL LAW—POWER OF THE EXECUTIVE TO PARDON—CRIMINAL CONTEMPT.—The respondent was adjudged in contempt of court for having published, in his annual report as head of the Anti-Saloon league, a severe criticism of the judgments of the court in a number of liquor cases. *State v. Shumaker*, 157 N. E. 769 (Ind. 1927) (two judges *dissenting*). The governor pardoned the prison sentence. The court issued a peremptory writ to respondent to show cause why execution of the judgment should not be ordered notwithstanding the governor's pardon. The respondent demurred. *Held* (the same two judges *dissenting*), that imprisonment for the term be ordered. Demurrer overruled. *State v. Shumaker*, 164 N. E. 408 (Ind. 1928).

The constitution of Indiana provides that the governor shall have power "to grant . . . pardons after conviction for all offenses except treason and cases of impeachment." IND. CONST., art. 5, § 17. While conceding that the contempt was criminal, the court held that it was not a crime because no jury trial was given as guaranteed by the Bill of Rights, and because it was not named as such by statute; the legislature having declared that all crimes against the state should be so defined. Thus the contempt was said not to be an "offense" within the meaning of the constitution. A provision giving power to pardon in "all criminal cases" has been held not to include criminal contempts. *Taylor v. Goodrich*, 40 S. W. 515 (Tex. Civ. App. 1897). But the term "offense" has been said to be more comprehensive. See *Ex parte Grossman*, 267 U. S. 87, 117, 45 Sup. Ct. 332, 336 (1924). The power has also been denied where the prisoner had violated an injunction, secured by the Attorney General, forbidding the sale of liquor. *Ex parte Green*, 116 Tex. 515, 295 S. W. 910 (1927) (reasoning not clear; said to be "a violation of an order made in a civil case" to which the power to pardon did not extend); Note (1927) 6 TEX. L. REV. 79. The executive may not pardon a civil contempt. *State v. Verage*, 177 Wis. 295, 187 N. W. 830; *People v. Peters*, 305 Ill. 223, 137 N. E. 118 (1922); see (1924) 19 ILL. L. REV. 176. With the exception of the Texas cases and the instant case, where the question has been decided, the courts have conceded the power of the executive to pardon what they found to be criminal contempt. *Ex parte Grossman, supra; Ex parte Magee*, 31 N. M. 276, 242 Pac. 332 (1925) (direct contempt; see criticism (1926) 21 ILL. L. REV. 379); *State v. Magee Pub. Co.*, 29 N. M. 455, 224 Pac. 1028 (1924) (indirect; constitution gives power to pardon "offenses"); *Sharp v. State*, 102 Tenn. 9, 49 S. W. 752 (1899) (contempt said to be a "public offense"); *Louisiana v. Sauvinet*, 24 La. Ann. 119 (1872) (state said to be the offended party); *Ex parte Hickey*, 4 S. M. 751 (Miss. 1840) (con-

stitutional power to pardon "criminal and penal cases"); see (1925) 24 MICH. L. REV. 189. It is argued that to concede the power would be repugnant to the constitutional separation of powers; that it would make the judiciary a dependent branch of government without power effectively to perform its function. See *In re Nevitt*, 117 Fed. 448, 456 (C. C. A. 8th, 1902); *State v. Verage*, *supra* at 323, 187 N. W. at 824. But those who concede it maintain that the pardoning power is needed as a check against a harsh judgment as much where a person is convicted by a judge without a jury, as where convicted in a jury trial. See *Ex parte Grossman*, *supra* at 122, 45 Sup. Ct. at 337; *Ex parte Magee*, *supra* at 279, 242 Pac. at 333. The fact that the power might be abused would seem to be no reason for denying it. Over a period of eighty-five years the President exercised the power twenty-seven times before it was sufficiently disputed to force a decision on the question. See *Ex parte Grossman*, *supra* at 118, 45 Sup. Ct. at 336. The instant case seems to have been one where the executive check on the judiciary might well have been allowed, since the constitutional provision would seem broad enough, and it was questionable whether a contempt had been committed. See (1927) 76 U. OF PA. L. REV. 210; (1927) 41 HARV. L. REV. 254.

CORPORATIONS—NON-CUMULATIVE PREFERRED STOCK—DIVIDENDS.—The defendant company's certificate of incorporation provided for five per cent, non-cumulative, preferred stock. From 1915 to 1925 no dividends were paid except for a partial dividend in 1917 of one per cent. Each year earnings sufficient to cover a five per cent dividend were turned back into the business for improvements and working capital. In 1927 and 1928, having paid the full five per cent dividend, the directors proposed to declare a dividend on junior preferred and common stock. Preferred shareholders sought to enjoin the latter dividends until the omitted dividends be made up on their stock. The lower court dismissed the bill. *Held*, on appeal (one judge *dissenting*), that the injunction issue since the withholding of dividends in years when earnings were sufficient resulted in granting dividend credit which must be made good before dividends may be paid on junior issues. *Barclay v. Wabash R. R.*, 30 F. (2d) 260 (C. C. A. 2d, 1929).

The policy of the instant decision aims to prevent the starvation of preferred shareholders by directors in the hope of obtaining greater subsequent earnings for common shares. See Berle, *Non Cumulative Preferred Stock* (1923) 23 COL. L. REV. 358. The wording of the certificate of incorporation may be construed so as to impose a duty to declare dividends on non-cumulative preferred stock if the current earnings are sufficient. *Burke v. Ottawa Gas Co.*, 87 Kan. 6, 123 Pac. 857 (1912). But usually the right to such dividends depends, expressly or by construction, on a declaration thereof by the directors. *New York R. R. v. Nickals*, 119 U. S. 296 (1886). In either case, if earnings be arbitrarily withheld, the shareholder may require the declaration of dividends. *Star Publishing Co. v. Ball*, 192 Ind. 158, 134 N. E. 285 (1922). In cases cited as authority for the instant decision, it was held that common shareholders could not object to the declaration of back dividends, earned but withheld, on non-cumulative preferred stock. *Wood v. Lary*, 47 Hun 550 (N. Y. 1888); *Bassett v. United States Cast Iron Pipe Co.*, 75 N. J. Eq. 539, 73 Atl. 514 (1909); *Collins v. Portland Electric Power Co.*, 12 F. (2d) 671 (C. C. A. 9th, 1926); *cf. Day v. United States Cast Iron Pipe Co.*, 96 N. J. Eq. 736, 126 Atl. 302 (1924) (holding, as in the instant case, that preferred shareholders could enjoin the payment of common dividends while non-cumulative preferred dividends remained undeclared though earned in previous years).

In the *Wood* case, however, the certificate of incorporation apparently gave an absolute right to dividends if earned, and in the *Day* case the same construction was made under section 18 of the New Jersey Corporation Act. N. J. COMP. STAT (1910) 1608. In the *Bassett* and *Collins* cases, the withheld earnings were "available" in the form of unnecessary reserve funds for working capital, accumulated from said earnings, which would indicate that the motive for withholding them was not based upon necessity, or that the necessity no longer existed. In the instant case, the withheld earnings were represented by fixed improvements and working capital in use, the only "available" funds were subsequent earnings, and it was admitted by both parties that the withholding of earnings was necessary for the interests of the business. The possibility of a necessary conversion of earnings into fixed assets would seem to be one of the risks accepted by the non-cumulative preferred shareholder and more consistent with the usual conception of non-cumulative stock.

EQUITY—SPECIFIC PERFORMANCE—PART PERFORMANCE AND THE STATUTE OF FRAUDS—MUTUALITY.—The plaintiff orally agreed to sell his land to the defendant, who paid part of the purchase price, entered into possession, and planted an extensive garden. Subsequently the defendant abandoned the premises, and on his refusal to complete the sale, the plaintiff successfully sued for specific performance. *Held*, on appeal, *inter alia*, that part performance by the defendant would not entitle the plaintiff-vendor to specific performance. Judgment reversed. *Palumbo v. James*, 164 N. E. 466 (Mass. 1929).

It is generally considered that the vendor's right to specific performance of an oral contract for the sale of land is predicated on the doctrine of mutuality, and exists where the vendee's part performance is sufficient to entitle him to the remedy. *Pearson v. Gardner*, 202 Mich. 360, 168 N. W. 485 (1918); (1918) 17 MICH. L. REV. 193; see *Seaman v. Aschermann*, 51 Wis. 678, 682, 8 N. W. 818, 820 (1881); POMEROY, SPECIFIC PERFORMANCE (3d ed. 1926) 301, n. § 118a. In many instances, the vendee's acts of part performance have also involved a change of position on the part of the vendor. Such acts might well be regarded as having the effect of part performance by the vendor, thus obviating the necessity of invoking the rule of mutuality as a reason for specific performance. *Witt v. Boothe*, 98 Kan. 554, 158 Pac. 851 (1916) (vendee paid part of purchase price, and took possession); *Cooper v. Thomason*, 30 Ore. 161, 45 Pac. 295 (1896); *cf. Andrew v. Babcock*, 63 Conn. 109, 26 Atl. 715 (1893) (rule of mutuality stated as a reason for specific performance; vendor altered the premises). The instant case, however questionable in result, finds some support in an earlier Massachusetts case. See *Barnes v. Boston & Maine R. R.*, 130 Mass. 388, 390 (1881). And it is in accord with the Massachusetts policy in refusing specific performance of an oral contract to buy land in the absence of circumstances approaching fraud on the plaintiff. Note (1904) 18 HARV. L. REV. 137.

EVIDENCE—CRIMINAL LAW—ADMISSIBILITY OF OTHER OFFENSES WHEN JURY HAS DISCRETION IN FIXING PUNISHMENT.—The defendants confessed to a robbery and prior crimes including a murder committed in the course of a burglary; in all of which the same pistol was used. On trial for the murder these confessions were admitted in whole over defendant's objection to portions relating to the subsequent robberies. Convicted of first degree murder, three of the defendants were sentenced to death, under a statute permitting the jury to assess punishment at either life imprisonment or

death. *Held* on appeal, that the judgments be affirmed, partly because there was a slight evidentiary connection between the murder and the other crimes, and partly because these subsequent crimes might properly influence the discretion of the jury in assessing punishment. *Commonwealth v. Parker*, 143 Atl. 904 (Pa. 1928).

The general principle, as usually phrased, is that other offenses of the accused are not admissible in evidence except as they tend to prove identity, system or course of conduct, intent, motive, or guilty knowledge. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286 (1901); *Wehenkel v. State*, 218 N. W. 137 (Neb. 1928). It is not enough that they show bad character. (1913) 26 HARV. L. REV. 656. In the case of confessions, if admissions of other offenses are so interwoven with pertinent matter that a separation would destroy the probative value of the latter, the whole confession is admissible, the jury being instructed to disregard the irrelevant portions. *People v. Loomis*, 178 N. Y. 400, 70 N. E. 919 (1904); *cf. Barnett v. State*, 50 Tex. Cr. 538, 99 S. W. 556 (1907) (applying same rule of exclusion to confessions as to other evidence of other acts). Moreover the question of admissibility is to a great degree left to the discretion of the trial judge. *Eagles v. United States*, 25 F. (2d) 546 (Ct. of App. D. C. 1928). In the instant case a statute permitted the jury, on finding the defendants guilty of first degree murder, to exercise their discretion in assessing punishment in the same verdict at either life imprisonment or death. Pa. Laws 1925, 759. The purpose of the statute was merely to enable juries to soften the effect of a verdict of first degree murder where evidence admissible under then existing rules revealed extenuating circumstances. (1925) 8 PA. LEG. JOUR. 2147; *ibid.* 2893. Where the jury has this discretion in assessing punishment there is all the more reason for excluding evidence of other offenses. *People v. Blevins*, 251 Ill. 381, 96 N. E. 214 (1911); *People v. Witt*, 170 Cal. 104, 148 Pac. 928 (1915). But the court in the instant case, taking judicial notice of the prevalence of habitual offenders, illustrates a correlation between crime waves and relaxation of the rules of evidence. For a similar relaxation in England of the rule against admitting other offenses see *Rex v. Chesshire*, 20 Cr. App. R. 47 (1927); (1928) 44 L. Q. REV. 1.

FRAUDULENT CONVEYANCES OF REAL ESTATE—INTENT AS A QUESTION OF FACT.—The defendant conveyed land without consideration, and thereby rendered himself insolvent. The plaintiff, a creditor at the time of the conveyance, sought to have the transfer set aside as fraudulent, but was denied relief. *Held*, on appeal, that the judgment be remanded and the conveyance set aside, on the ground that the defendant must be deemed to have intended the natural consequences of her act which hindered, delayed and defrauded her creditors and so was fraudulent in fact within a statute [MONT. REV. STAT. (1921) § 8606] providing that fraudulent intent in such cases is a question of fact, not of law. *National Bank of Anaconda v. Yegen*, 271 Pac. 612 (Mont. 1928).

In some jurisdictions creditors may have a voluntary conveyance by a debtor set aside, even though no "fraudulent intent" or insolvency is shown. *Wood v. Potts*, 140 Ala. 425, 37 So. 253 (1903); *cf. Gant v. Dunn*, 110 So. 903 (Ala. 1927). The same result may be reached by holding that a voluntary conveyance is conclusively presumed to be fraudulent against existing creditors. *Allee v. Shay*, 268 Pac. 962 (Cal. 1928) (by statute); *cf. Williams v. Travis*, 277 Fed. 134 (C. C. A. 5th, 1922). In many jurisdictions a voluntary conveyance merely raises a rebuttable presumption of fraud. *Lynes v. Holt*, 1 S. W. (2d) 121 (Mo. 1927); see *Russ v. Blackshear*, 88 Fla. 573,

576, 102 So. 749, 750 (1925). Some courts require a showing of insolvency at the time of the voluntary conveyance. *Nevers v. Hack*, 138 Ind. 260, 37 N. E. 791 (1894); *Culp v. Trent*, 99 Okla. 112, 226 Pac. 348 (1924). Others have held an allegation that the voluntary conveyance has rendered the grantor insolvent sufficient to set aside the conveyance. *Benson v. Harriman*, 55 Cal. App. 483, 204 Pac. 255 (1921); *Chamberlain v. Fay*, 216 N. W. 700 (Iowa 1927) (executor may set aside testator's conveyance); *Allee v. Shay, supra* (one reducing tort claim to judgment after conveyance may have it set aside). A voluntary conveyance made by a solvent debtor in anticipation of insolvency will be set aside in favor of his trustee in bankruptcy. *Klinger v. Hyman*, 223 Fed. 257 (C. C. A. 2d, 1915); *Jones v. Williams*, 94 Vt. 175, 109 Atl. 803 (1920) (possibility of insolvency foreseeable). Imputed "motive" rather than "actual intent" appears to control in these cases, undoubtedly because of the difficulty of ascertaining "actual intent." See *Cal. Consol. Min. Co. v. Manley*, 10 Idaho 786, 799, 81 Pac. 50, 53 (1905); *Brady v. Irby*, 101 Ark. 573, 581, 142 S. W. 1124, 1127 (1912). Under a statute similar to that in the instant case, a showing of actual fraudulent intent has been required. *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873 (1891). But legislative amendment soon followed. *Allee v. Shay, supra*, at 968. A mere lack of consideration generally raises no presumption of fraud under statutes of the instant type. *Cf. McMillan v. McMillan*, 42 Idaho 270, 245 Pac. 98 (1926); *Vacuum Oil Co. v. Quigg*, 127 Okla. 61, 259 Pac. 858 (1927). But *cf. Davis v. Davis*, 20 Ore. 78, 25 Pac. 140 (1890). And such statutes will not prevent a finding of "constructive" fraud. See *Leader Pub. Co. v. Grant Trust Co.*, 182 Ind. 651, 660, 108 N. E. 121, 124 (1915). Although the statutes would seem to require determination of the subjective intent, the objective treatment in the instant case appears justifiable to avoid fraud, perjury, and fruitless litigation.

LIMITATION OF ACTIONS—BONDS—PERIOD APPLICABLE TO INTEREST COUPONS.—In an action on interest coupons, which had been detached from bonds and which indicated on their face that they represented interest arising on said bonds, the defendant pleaded the six year statute of limitations for simple contracts, contending that the sixteen year period provided for specialities was inapplicable. The lower court gave judgment for the defendant. *Held*, on appeal (two judges *dissenting*), that the judgment be affirmed. *Dickerson v. Wilkes-Barre & Hazelton R. R.*, 143 Atl. 618 (N. J. 1926).

In general, in determining what period of limitations is applicable to interest coupons on bonds, the courts, contrary to the instant case, apply the period prescribed for specialities, on the ground that the coupon merely represents the interest obligation arising on the bond and that the addition of the coupon to the bond does not change the nature of that obligation. *City of Lexington v. Butler*, 14 Wall. 282 (U. S. 1871); *Cushman v. Board*, 19 Minn. 295 (1872); *Kelly v. Forty-Second St., M. & St. N. Ave. Ry.*, 37 App. Div. 500, 55 N. Y. Supp. 1096 (1st Dep't 1899); *Prescott v. Williamsport & N. B. Ry*, 159 Fed. 244 (C. C. E. D. Pa. 1908); *McDowell v. North Side Bridge Co.*, 251 Pa. 585, 97 Atl. 97 (1916); see *California Trust Co. v. Sierra Valley Ry.*, 158 Cal. 690, 694, 112 Pac. 274, 276 (1910); *cf. Toothaker v. City of Boulder*, 13 Colo. 219, 22 Pac. 468 (1889) (new promise not under seal held not to toll the statute as to coupon). In many respects, however, the addition of the coupon does change the legal incidents of the interest obligation. Thus, the statute of limitations begins to run at the date of maturity of the coupons, rather than from the maturity date of the bond. *Clark v. Iowa City*, 20 Wall. 583 (U. S. 1874) (coupons detached); *Amy v.*

Dubuque, 98 U. S. 470 (1878) (coupons not detached); 1 WOOD, LIMITATIONS (4th ed. 1916) § 127; *cf. Griffin v. Macon County*, 36 Fed. 885 (C. C. E. D. Mo. 1888) (action on coupons barred by limitations; interest represented thereby cannot be recovered by sueing on the bond for interest independently of the coupons). *Contra: Ehret v. Price*, 254 Pac. 748 (Okla. 1927); see *Berkey v. Board of Com'rs*, 48 Colo. 104, 115, 110 Pac. 197, 201 (1910). Where the bond is issued without coupons an action for interest installments is not barred until the bond is barred. *Ade v. Ade*, 181 Ill. App. 577 (1913); WOOD, *op. cit. supra*, § 119d (3). *Contra: May v. Ball*, 108 Ky. 180, 56 S. W. 7 (1900) (statute of limitations begins to run as interest becomes due). Interest by way of damages will accrue on an interest coupon from the date of maturity of the coupon. *Hamilton v. Wheeling Public Service Co.*, 88 W. Va. 573, 107 S. E. 401 (1921). But interest, as damages, will not run on unpaid interest installments on a non-coupon bond, in the absence of an express agreement therefor. *Boggess v. Goff*, 47 W. Va. 139, 34 S. E. 741 (1899). *Contra: Hall v. Scott*, 90 Ky. 340, 13 S. W. 249 (1890). The instant case seems logically to be justified in treating interest coupons as obligations separate and distinct from the bond.

MUNICIPAL CORPORATIONS—NOTICE BEFORE SUIT—PLEADING.—The charter of the defendant city provided that "No action or proceeding to recover or enforce any claim against the city shall be brought until the expiration of forty days after" presentation of the claim. The plaintiff sued for an injunction and for damages for injury caused its property by the improper discharge of the city sewage. *Held*, that the complaint be dismissed for failure to present the claim as required. The court also stated that, since the injunctive relief sought was only incidental and the recovery of damages "at law" was the main object of the action, a suit "in equity" would not lie. *Squaw Island Freight & T. Co. v. City of Buffalo*, 133 Misc. 64, 231 N. Y. Supp. 139 (Sup. Ct. 1928).

The requirement of notice and presentation of claims against municipal corporations is of statutory creation. *Cf.* 6 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 2654; *City of Globe v. Rabogliatti*, 24 Ariz. 392, 210 Pac. 685 (1922) (ordinance requiring notice is inoperative). Such a requirement furthers the policy of avoiding needless litigation by affording an opportunity for settlement out of court. See *City of Dallas v. Shows*, 212 S. W. 633, 634 (Tex. Comm. App. 1919); 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) 2813. The statutes are strictly construed, being in derogation of "common right." See *City of San Antonio v. Pfeiffer*, 216 S. W. 207, 208 (Tex. Civ. App. 1919). They are not unconstitutional, however, as class legislation creating a distinction between municipal and private corporations. *O'Neil v. City of Richmond*, 141 Va. 168, 126 S. E. 56 (1925); *Frasch v. City of New Ulm*, 130 Minn. 41, 153 N. W. 121 (1915) (even though the claim arises out of the performance of a private function); see (1927) 14 VA. L. REV. 138, 139. *Contra: Borski v. City of Wakefield*, 215 N. W. 19 (Mich. 1927) (no notice necessary where injuries are incidental to the conduct of a private business enterprise); *cf. Marshall v. Whatcom County*, 255 Pac. 654 (Wash. 1927); Note (1928) 52 A. L. R. 639, 640. Judicial decisions of the necessity of notice in the particular case vary with the construction of the statute involved. *Cf. Steltz v. City of Wausau*, 88 Wis. 618, 60 N. W. 1054 (1894) (charter expressly including tort claims); see MCQUILLIN, *op. cit. supra*, § 2629. Where the language is not explicit the courts have difficulty in determining the exact scope of the provision. *Cf. Haley & Lang Co. v. City of Huron*, 36 S. D. 6, 153 N. W. 891 (1915) ("accounts" does not include tort claims); *Adams v. City of*

Modesto, 131 Cal. 501, 63 Pac. 1083 (1901) ("claim and demand" may include tort demands but requirement of "audit" excludes them); *Kelly v. City of Butte*, 44 Mont. 115, 119 Pac. 171 (1911) ("person injured" restricts provision to personal injuries; does not include injuries to property). A number of courts have not insisted on the statutory notice where active malfeasance, rather than negligence, was involved. *Nienow v. Village of Mapleton*, 144 Minn. 60, 174 N. W. 517 (1919); *City of Portsmouth v. Weiss*, 145 Va. 94, 133 S. E. 781 (1926) (statute covering "claim"). Or where the object of the action was an injunction. *Kiser v. Douglas County*, 70 Wash. 242, 126 Pac. 622 (1912) (statute covering "claim"); *Davis v. City of Appleton*, 109 Wis. 580, 85 N. W. 515 (1901) (statute covering "claim or demand"); *Wall v. Salt Lake City*, 50 Utah 593, 168 Pac. 766 (1917) (even though incidental damages were also sought). The instant holding is based on precedent. *Cf. Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792 (1886). But the plaintiff in the *Reining* case sought damages only. The prayer for an injunction might have been relied upon to relieve the plaintiff of the necessity of notice without violating the charter provision. The language of the court as to the "legal" or "equitable" nature of a code cause of action seems questionable. See CLARK, CODE PLEADING (1928) 49-50.

NEGOTIABLE INSTRUMENTS—BONDS—NEGOTIABILITY—REFERENCE TO DEED OF TRUST.—Three bonds were stolen from the plaintiff and sold to the defendant. Each instrument provided that "This bond is . . . entitled to the benefits of and subject to the provisions of a mortgage and deed of trust. . . ." In a separate sentence reference is made to the mortgage "for a description of the property mortgaged, and . . . the rights of the holders . . . with respect thereto." In an action to recover for their wrongful sale, judgment was given for the defendant. *Held*, on appeal, that the bonds were negotiable as the quoted provisions were merely a reference to the security. Judgment affirmed. *Enoch v. Brandon*, 249 N. Y. 263, 164 N. E. 45 (1929).

A mere reference to a collateral agreement for rights respecting security does not impair negotiability. *Bank of California v. National City Co.*, 138 Wash. 517, 244 Pac. 690 (1926) (bonds); *Higgins v. Hocking Valley Ry.*, 188 App. Div. 684, 177 N. Y. Supp. 444 (1st Dep't 1919). But otherwise in the case of a provision that the instrument is "subject to" the terms or conditions of a separate contract, the promise being construed as conditioned thereby. *Hull v. Angus*, 60 Ore. 95, 118 Pac. 284 (1911) (notes "subject to all the terms and conditions of said mortgage"); *Verner v. White*, 214 Ala. 550, 108 So. 369 (1926) *semble; King Cattle Co. v. Joseph*, 158 Minn. 481, 198 N. W. 798, 199 N. W. 437 (1924) (bonds; in addition, the mortgage was "made a part hereof"); Aigler, *Conditions in Bills and Notes* (1928) 26 MICH. L. REV. 471, 485; see *National Bank of Newberry v. Wentworth*, 218 Mass. 30, 32, 105 N. E. 626 (1914) (distinguishing between "as per terms of" and "subject to" the contract). And it seems immaterial whether the terms or conditions which the instrument is "subject to" would impair negotiability if written on the face of the challenged instrument. See *Enoch v. Brandon, supra;* Note (1928) 76 U. OF PA. L. REV. 867; *cf. King Cattle Co. v. Joseph, supra.* Or whether the terms or conditions have been fulfilled. *Greenbrier Valley v. Bair*, 71 W. Va. 684, 77 S. E. 274 (1913). *Contra: Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178 (1902). Accordingly, a note "subject to terms of conditional sales agreement" has, in New York, been held non-negotiable because the promise to pay was not "absolute on its face." *Old Colony Trust Co. v. Stumpel*, 247 N. Y. 22, 161

N. E. 173 (1928); (1928) 37 YALE L. J. 665. There is some difficulty in reconciling this case with the instant decision. A promise which is "subject to the provisions of a mortgage" is not absolute on its face, and to hold that an additional reference to the mortgage "for a description of the property mortgaged . . . and the rights . . . with respect thereto" removes the conditional nature of the promise may well seem a doubtful construction. On the other hand, business convenience may justify holding some conditional instruments negotiable, and if no category within the Negotiable Instruments Law can be found for them judicially, legislative action should be had. *Cf.* N. Y. LAWS (Cahill, Supp. 1928) c. 42, §§ 260, 261 (making conditional security receipts negotiable); Note (1928) 42 HARV. L. REV. 115. Such a step would now be apropos since a revision of the Negotiable Instruments Law is being undertaken. See Britton, *Proposed Amendments to Negotiable Instruments Law* (1928) 22 ILL. L. REV. 815, 818; *cf.* Turner, *Revision of the Negotiable Instruments Law* (1928) 38 YALE L. J. 25.

PLEADING AND PRACTICE—INSURANCE—CONDITIONS PRECEDENT.—The defendant insurance company had issued a liability policy to *H*. The plaintiff, having secured a judgment against *H*, sued to recover the amount of the judgment from the defendant, alleging that *H* had duly performed all the conditions of the policy. The defendant filed a general denial. The testimony failed to disclose that *H* had performed any of those conditions and the trial court gave judgment for the defendant. *Held*, on appeal, that the plaintiff could plead compliance with the various conditions precedent in general terms and that he need only prove compliance with those conditions which the defendant puts in issue. Judgment reversed. *Harty v. Eagle Indemnity Co.*, 143 Atl. 847 (Conn. 1928).

In a suit on a contract, under the common-law rule, the plaintiff was forced to allege specially compliance with every condition precedent, and had the burden of proving such compliance. SHIPMAN, COMMON-LAW PLEADING (Ballantine's ed. 1923) 249. Where the terms and conditions in a contract are numerous, code provisions in many states permit the plaintiff to allege generally that he has complied with all of them. *New Zealand Ins. Co. v. Brewer*, 29 Ga. App. 773, 116 S. E. 922 (1923); CLARK, CODE PLEADING (1928) 192. Under such statutes the defendant is usually required to plead a special denial of the plaintiff's compliance with a specific condition. *Halferty v. Wilmering*, 112 U. S. 713, 5 Sup. Ct. 364 (1885); *National Surety Co. v. Queen City Land & Mortgage Co.*, 63 Colo. 105, 164 Pac. 722 (1917); *Russell v. Granite State Fire Ins. Co.*, 121 Me. 248, 116 Atl. 554 (1922). Apparently, however, even in insurance cases, according to the rule as usually stated, once such plea is made the plaintiff must prove compliance with those conditions. *Cf. Aetna Life Ins. Co. v. Bethel*, 140 Ky. 609, 131 S. W. 523 (1910); 5 JOYCE, INSURANCE (2d ed. 1918) § 3790. Some courts have placed the burden of proof on the defendant by treating certain pleas of breach of condition as affirmative defenses. *Shaw v. Mutual Protective Ins. Co.*, 9 S. W. (2d) 685 (Mo. App. 1928) (condition of notice); *Murphy v. Mutual Reserve Fund Life Ass'n*, 114 Fed. 404 (C. C. D. Ind. 1902) (non payments of assessments). The same result is furthered by a tendency to construe conditions as subsequent whenever possible. CLARK, *loc. cit. supra*. On the other hand, it has been held that a general denial by the defendant required the plaintiff to offer evidence of the furnishing of proofs of loss. *Steinsultz v. Illinois Bankers Life Ass'n*, 229 Ill. App. 199 (1923). Similarly a plea of the general issue has been held sufficient to require the plaintiff to prove that the insured had complied with the condition of "delivery in good health." *North British and Mercantile Ins. Co. v. Lucky Strike Oil & Gas Co.*, 70 Okla. 146, 173 Pac. 845 (1918). It

is submitted that the instant case represents the more convenient rule. Furthermore, it is well within the authority of the Connecticut cases, even though such pleading is not expressly permitted by the code. *Hennessey v. Metropolitan Life Ins. Co.*, 74 Conn. 699, 52 Atl. 490 (1902); see *Martoni v. Mass. Fire & Marine Ins. Co.*, 106 Conn. 519, 521, 138 Atl. 462 (1927).

PRINCIPAL AND AGENT—RESPONSIBILITY OF PRINCIPAL FOR TORTIOUS ACT OF AGENT—ACT OF BENEFIT SOLELY TO AGENT.—The defendant railroad employed an agent whose duty it was to give notice to consignees of the arrival of cotton under "order notify" bills of lading. In accordance with a fraudulent scheme, the agent notified the plaintiff of the arrival of cotton which in fact had never been shipped. Relying on this information, the plaintiff paid a draft, the proceeds of which the agent appropriated for his own use. In an action brought to recover this amount, judgment was given for the defendant. *Held*, on appeal, that the defendant was responsible for the acts of its agent committed in the scope of his employment although motivated by the sole design to benefit himself. Judgment reversed. *Gleason v. Seaboard Ry.*, 49 Sup. Ct. 161 (U. S. 1929).

When an authorized agent has issued a bill of lading although no goods have been shipped, most courts have followed the Supreme Court in refusing to hold the railroad responsible. *Friedlander v. Texas Ry.*, 130 U. S. 416, 9 Sup. Ct. 570 (1889) (action for non-delivery of goods); 1 MECHEM, AGENCY (2d ed. 1914) § 760. *Contra: Bank of Batavia v. N. Y. R. R.*, 106 N. Y. 195, 12 N. E. 433 (1887) (action for wrongful issue of the document). Section 22 of the Federal Bills of Lading Act provides, however, that "If a bill of lading has been issued . . . by an agent . . . whose actual or apparent authority includes the issuance of bills of lading . . . the carrier shall be liable . . . for damages caused by the non-receipt of goods." 39 STAT. 542 (1916), 49 U. S. C. § 102 (1926). The Circuit Court of Appeals inferred from this legislation the intention to leave unchanged the general rule as to agents whose authority did not include the issuance of bills of lading, and it adhered to the implications of the *Friedlander* case. *Gleason v. Seaboard Ry.*, 21 F. (2d) 883 (C. C. A. 5th, 1927). The instant case overrules the *Friedlander* case to the extent of the implication that there is no responsibility on the principal in tort in the present situation. Whether an action on the contract itself would lie remains an open question. *Cf. Hill v. Union Trust Co.*, 108 Pa. 1 (1884) (allowing assumpsit in case of fraudulent certification of check). In many analogous situations, the principal has been held responsible in tort. *McCord v. Western Union*, 39 Minn. 181, 39 N. W. 315 (1888) (money order message); *Havens v. Bank of Tarboro*, 132 N. C. 214, 43 S. E. 639 (1903) (issuance of stock certificate). But *cf. Hudson Trust Co. v. Linseed Trust Co.*, 232 N. Y. 350, 134 N. E. 778 (1922) (agent must have authority to issue genuine stock certificates). This result obtains in England. *Lloyd v. Grace*, [1912] A. C. 716 (fraudulent conversion of customer's securities by solicitor's agent). The instant decision would appear commendable since the defendant has placed its agent in the position to do the act complained of, and the actual existence of the conditions precedent to authorized performance is peculiarly within the agent's own knowledge. *Cf.* 2 MECHEM, *op. cit. supra*, § 1800; *Wichita Bank v. Atchison T. & S. F. R. R.*, 20 Kan. 519 (1878) (railroad estopped to deny receipt of goods).

PROPERTY—RESTRICTIVE COVENANTS—RIGHT OF PRIOR GRANTEE UNDER COMMON GRANTOR TO ENFORCE COVENANTS IN DEED TO SUBSEQUENT GRANTEE.—The plaintiff and the defendant owned adjoining lots, holding from a common grantor, who owned other tracts in the same block. The

grantor had conveyed some of these lots without restrictions. The conveyance to the defendant was prior to that to the plaintiff. Both restricted the use of the property to private dwellings. The plaintiff sought a determination of the defendant's right to enforce the covenant in the plaintiff's deed. *Held*, that the defendant could not enforce the restriction, since there was no showing of a general plan of restriction. *Semple v. Clark*, 132 Misc. 903, 230 N. Y. Supp. 738 (Sup. Ct. 1928).

Where there is a common grantor, a prior grantee may enforce the restrictive covenant of a subsequent grantee by showing the existence of a general building plan. *Lacentra v. Valeri*, 244 Mass. 404, 138 N. E. 388 (1923); *Library Neighborhood Ass'n v. Goosen*, 229 Mich. 89, 201 N. W. 219 (1924). Such a plan is not established when restrictions imposed are not uniform and are not imposed on all lots within the area intended to be included in the scheme. *St. Patrick's Ass'n v. Hale*, 227 Mass. 175, 116 N. E. 407 (1917); *Enderle v. Leslie Const. Co.*, 141 Atl. 758 (N. J. Eq. 1928). The absence of any general plan in the instant case might be implied from the grantor's retention of adjoining property without himself entering into an agreement similar to that which he exacted from the purchasers. *Cf. Sharp v. Ropes*, 110 Mass. 381 (1872); *Osborne v. Bradley*, [1903] 2 Ch. 446. That similar agreements were exacted from other purchasers does not of itself show the existence of a general plan. *Dime Savings Bank v. Butler*, 96 Misc. 82, 160 N. Y. Supp. 954 (Sup. Ct. 1916); *Bealmear v. Tippett*, 145 Md. 568, 125 Atl. 806 (1924); *Pierson v. Canfield*, 272 S. W. 231 (Tex. Civ. App. 1925). In the absence of a general building scheme, the prior grantee may enforce a covenant of the subsequent grantee by showing that the restriction was intended for his benefit. *Milligan v. Balson*, 214 Mo. App. 627, 264 S. W. 73 (1924); *Voegler v. Alwyn Improvement Corp.*, 247 N. Y. 131, 159 N. E. 886 (1928); *cf. Puddington v. Vielbig*, 142 Atl. 171 (N. J. Eq. 1928); see Note (1928) 13 CORN. L. Q. 619, 621. It has been suggested that the later covenants might have been taken in trust for the earlier grantees. See Note (1912) 12 COL. L. REV. 158, 160; Stone, *Rights of Strangers to the Contract* (1919) 19 COL. L. REV. 177, 186. On the theory that the covenant was intended to be personal, the grantor alone might have the right to sue on it, even though he retained no land. *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194 (1913); *cf.* Stone, *Equitable Liabilities of Strangers* (1918) 18 COL. L. REV. 291, 313; Clark, *Easements and Equitable Restrictions* (1928) 38 YALE L. J. 139, 160. *Contra: American Cannel Coal Co. v. Indiana Cotton Mills*, 78 Ind. App. 115, 134 N. E. 891 (1922); 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 399. The instant decision is in accord with a modern tendency to look with disfavor upon restrictions on the use of land and to refuse to enforce them unless clearly indicated. *Cf. Heisler v. Marceau*, 116 So. 447 (Fla. 1928); *Paff v. Margerum*, 142 Atl. 6 (N. J. 1928).

STATUTE OF FRAUDS—BROKERS—CONTRACT TO PAY COMMISSION FOR NEGOTIATION OF LEASE CONTAINING OPTION TO PURCHASE.—A statute made any contract employing an agent to sell or purchase real estate on commission "void" unless evidenced by some memorandum in writing. 1 ORE. LAWS (Olson, 1920) § 808 (8). The plaintiff was allowed recovery on an allegation that the defendant orally agreed to pay him a commission for negotiating a lease of land and buildings which contained an option to purchase. *Held*, on appeal, that this contract was not within the statute. Judgment reversed on other grounds. *Richanbach v. Ruby*, 271 Pac. 600 (Ore. 1928).

Statutes similar to the one involved in the instant case have recently been adopted in many of the states. *Cf.* CAL. CIV. CODE (Deering, 1923) § 1973

(6); MICH. COMP. LAWS (1915) § 11981 (5); N. J. COMP. STAT. (Ann. Supp. 1924) § 84–10. The result reached by the Oregon court is supported by what is apparently the only decision directly in point. *Kramer v. Schmidt*, 62 Mont. 568, 206 Pac. 620 (1922) (oral agreement for commission for procuring assignment of option to purchase land). In holding that the type of statute in question did not apply to contracts by which brokers agree to divide commissions, the California court of appeals further adopted the view that the statute did not embrace contracts to procure an option. *Howard v. D. W. Hobson Co.*, 38 Cal. App. 445, 176 Pac. 715 (1918) (Supreme Court on rehearing specifically refused to commit itself upon the second proposition). The reasoning of the instant case emphasized the technical distinction between an option and a sale. *Cf.* JAMES, OPTION CONTRACTS (1916) § 401; 1 WARVELLE, VENDORS (2d ed. 1902) § 126. But there is ample authority to the effect that an oral option upon land is unenforceable under the generic statutes of frauds. *Lyons v. Bass*, 103 Ga. 573, 34 S. E. 721 (1899); *Hilberg v. Greer*, 172 Mich. 505, 138 N. W. 201 (1912); *Granger Real Estate Exch. v. Anderson*, 145 S. W. 262 (Tex. Civ. App. 1912); *Stewart v. Cadeau*, 109 Wash. 292, 186 Pac. 894 (1920). It is submitted that statutory interpretation here might well have been governed by an inquiry as to the most effective means of preventing the evils against which the statute was directed. These were the fraudulent suits for commissions, which had previously been numerous and difficult to combat. See (1928) 4 WIS. L. REV. 379, 380; *Covey v. Henry*, 71 Neb. 118, 123, 98 N. W. 434, 435 (1904). The opportunity for fraudulent commission suits would appear to be as great in the case of an option as in that of a sale. The attitude of most courts would probably be that such an argument should be addressed to the legislature.

TAXATION—INCOME—DEDUCTION FOR OBSOLESCENCE OF GOOD WILL.—The plaintiff, a brewing company, was refused any deduction in its 1919 income tax for obsolescence of its good will due to the imminence of national prohibition legislation. Section 234 (a) (7) of the Revenue Act of 1918 [40 Stat. 1077 (1919), 26 U. S. C. § 955 (1926)] provides: "that in computing the net income . . . there shall be allowed as deductions: . . . a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. . . ." The district court refused to confirm the findings of a special master reversing the collector. *Held*, on appeal, that the judgment be reversed as good will is "property" as used in the Act and the deduction therefor should be allowed. *Haberle Crystal Spring Brewing Co. v. Clark, Collector of Internal Revenue*, 30 F. (2d) 219 (C. C. A. 2d, 1929).

Two circuits have reached an opposite result on the same state of facts. *Redwing Malting Co. v. Willcuts*, 15 F. (2d) 626 (C. C. A. 8th, 1926), *cert.* denied, 273 U. S. 763, 47 Sup. Ct. 476 (1926); *Landsberger v. McLaughlin*, 26 F. (2d) 77 (C. C. A. 9th, 1928). Before the decision in the *Redwing* case, the Board of Tax Appeals appeared to favor such deductions where the value of good will could be shown. *Appeal of Rock Spring Distilling Co.*, 2 B. T. A. 207 (1925); *Appeal of Northern Hotel Co.*, 3 B. T. A. 1099 (1925); *Appeal of Peter Breidt Co.*, 2 B. T. A. 1190 (1925); *Appeal of McQuade*, 4 B. T. A. 837 (1926). Since this decision these deductions have been disallowed. *Appeal of Manhattan Brewing Co.*, 6 B. T. A. 952 (1927); *Appeal of Secor Hotel*, 7 B. T. A. 158 (1927); *Coshland v. Comm. of Internal Revenue*, 7 B. T. A. 630 (1927). Good will is much akin to patents and copyrights, but differs in that the life of the latter two are strictly limited by time. Accountants generally concede that both patents and copy-

rights are subject to depreciation as well as obsolescence. BELL, AUDITING (1925) 244; 2 FINNEY, PRINCIPLES OF ACCOUNTING (1927) c. 42, pp. 1-3; COLE, FUNDAMENTALS OF ACCOUNTING (1920) 370; CASTENHOLZ, AUDITING PROCEDURE (1920) 83; MONTGOMERY, AUDITING THEORY AND PRACTICE (2d ed. 1917) 123. They generally agree that it is neither necessary nor desirable to depreciate good will. BELL, *op. cit. supra* at 242; FINNEY, *op. cit. supra* c. 41, p. 12; COLE, *op. cit. supra* at 368; CASTENHOLZ, *op. cit. supra* at 79-80; MONTGOMERY, *op. cit. supra* at 123, 427. Some experts believe that good will does not suffer wear and tear and is not susceptible to obsolescence. CASTENHOLZ, *op. cit. supra* at 79-80; MONTGOMERY, *op. cit. supra* at 123. The other authorities mentioned do not appear to employ the term obsolescence in connection with good will. But see KLEIN, FEDERAL INCOME TAXATION (1929) 656-660. The administrative impracticability of evaluating good will seems a cogent objection. The solution of the question, however, must depend on various economic factors which would seem to necessitate consideration by the Supreme Court.

TRADE REGULATION—CLAYTON ACT—ACQUISITION BY A CORPORATION OF STOCK CONTROL IN A COMPETING CORPORATION.—The *X* Company, the largest manufacturer of shoes in the United States, acquired nearly all the capital stock of the *Y* Company, the largest shoe manufacturer in New England, at a time when the latter company was in financial straits. The *X* Company required additional facilities to fill its orders. It produced a line of shoes comparable in price and quality to those produced by the *Y* Company. The Federal Trade Commission concluded that the purchase of shares in *Y* Company violated section 7 of the Clayton Act, which prohibits a corporation engaged in commerce from acquiring shares in another corporation where the effect may be "to substantially lessen competition." 38 STAT. 731 (1914), 15 U. S. C. § 18 (1926). The Commission issued an order directing the *X* Company to divest itself of the shares so acquired. *Held*, on petition to review, that the order was proper. *International Shoe Co. v. Federal Trade Comm.*, 29 F. (2d) 518 (C. C. A. 1st, 1928).

The courts have sustained orders by the Federal Trade Commission to corporations to "cease and desist" from holding stock control of competing corporations in violation of section 7 of the Clayton Act. *Federal Trade Comm. v. Western Meat Co.*, 272 U. S. 554, 47 Sup. Ct. 175 (1926); *Aluminum Co. of Am. v. Federal Trade Comm.*, 284 Fed. 401 (C. C. A. 3d, 1922); *United States v. New Eng. Fish Exchange*, 258 Fed. 732 (D. Mass. 1919). But the Commission has no power to order a corporation to divest itself of physical assets of another corporation acquired prior to the Commission's action. *Federal Trade Comm. v. Western Meat Co., supra.* Where there is no competition between the products of the companies, unity of control by stock ownership is legal. *Niles-Bement-Pond Co. v. Iron Moulders' Union*, 246 Fed. 851 (S. D. Ohio 1917), *rev'd* on other grounds, 254 U. S. 77, 41 Sup. Ct. 39 (1920); *Alexander Milburn Co. v. Union Carbide & Carbon Co.*, 15 F. (2d) 678 (C. C. A. 4th, 1926) (suit under Sherman Act). The mere size of a corporation, or the existence of unexerted power, unaccompanied by unlawful conduct, is no offense. *United States v. International Harvester Co.*, 274 U. S. 693, 47 Sup. Ct. 748 (1927); *United States v. United States Steel Corp.*, 251 U. S. 417, 40 Sup. Ct. 293 (1920); *United States v. American Can Co.*, 230 Fed. 859 (D. Md. 1916). The Sherman Act, as interpreted by the Supreme Court, has been held to prohibit many forms of combination and to be applicable to a great variety of trade practices. *Cf. Standard Oil v. United States*, 221 U. S. 1, 31 Sup. Ct. 502

(1911); *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632 (1911); Montague, *Anti-Trust Laws and the Federal Trade Commission, 1914-1927* (1927) 27 COL. L. REV. 650, 664. The Clayton Act is little more than an interpretation of the broader provisions of the Sherman Act, and its elaborate detail may easily become a source of confusion. Levy, *The Clayton Law—An Imperfect Supplement to the Sherman Law* (1916) 3 VA. L. REV. 411. The instant case, in construing section 7 of the Clayton Act strictly, looks solely to the maintenance of competitive conditions. Such a doctrine, pushed to its logical extreme, would prohibit the merger or consolidation of any competing companies. Legislative fiat has not affected the irresistible economic trend towards industrial consolidation and elimination of the wastes of unrestricted competition. In applying section 7 of the Clayton Act the courts might well take cognizance of the purpose of the acquisition and its effect on the public interest. *Cf.* Kales, *Good and Bad Trusts* (1917) 30 HARV. L. REV. 830.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF WHERE CONFIDENTIAL RELATION EXISTED.—The testator devised most of his estate to second and third cousins, to the exclusion of an uncle who was his next of kin and sole heir at law. The uncle contested the will, alleging undue influence. The testator had lived with these beneficiaries, and one of them had managed his property. The lower court instructed the jury that no confidential relation existed sufficient to shift the burden of proof as to undue influence to the beneficiary proponents. *Held*, that the judgment for the proponents be reversed, on the ground that the lower court should have left to the jury the issue whether such a confidential relation existed as to "shift the burden of proof" to the proponents. *Page v. Phelps*, 143 Atl. 890 (Conn. 1928).

In Connecticut the burden of proving undue influence as affecting the validity of a will rests, in general, on the party asserting it. *Goodno v. Hotchkiss*, 88 Conn. 655, 92 Atl. 419 (1914). An exception is made where the will cuts off "the natural objects of the testator's bounty" in favor of a stranger who occupied a relation of special confidence and trust to the testator. In that situation, it has been said that the "burden of proof" is shifted to the proponents. *Cf. Kirby's Appeal*, 91 Conn. 40, 98 Atl. 349 (1916). Further statements to the effect that the proponents must disprove undue influence by "a preponderance of all the evidence" indicate that the burden of proof is regarded in the primary sense of the "risk of non-persuasion" and not in the secondary sense of the "duty of producing evidence." See *Lockwood v. Lockwood*, 80 Conn. 513, 522, 69 Atl. 8, 11 (1908); *Kirby's Appeal, supra* at 44, 98 Atl. at 350. The view has been criticized as violating the generally accepted theory that the "burden of proof" in the sense of the "risk of non-persuasion" never shifts during the course of a trial. Comment (1916) 26 YALE L. J. 62; *cf.* Gifford, *Will or No Will* (1920) 20 COL. L. REV. 862, 878. Furthermore, the wisdom of putting the "risk of non-persuasion" on beneficiaries in a confidential relationship appears doubtful, as tending to discourage such relationships. Many courts have altered their position or clarified former statements, and have held that a confidential relationship merely raises a presumption of undue influence that shifts to the proponent only "the duty of producing evidence." *Matter of Kindberg*, 207 N. Y. 220, 100 N. E. 789 (1912); *In re Keeley's Estate*, 167 Minn. 120, 208 N. W. 535 (1926); *Madden v. Keyser*, 331 Ill. 643, 163 N. E. 424 (1928); PAGE, WILLS (2d ed. 1926) § 716. But *cf. Munday v. Knox*, 9 S. W. (2d) 960 (Mo. 1928). The court in the instant case, repeating the language of previous decisions, placed the burden of proof in the sense of risk of non-persuasion on the beneficiary. The decision ap-

pears to mark an extension in that in former decisions the court had restricted the doctrine of confidential relationships to situations involving lawyers, physicians, religious advisers, and those in closely analogous relations, and had ruled, in situations similar to the instant one, that it was error to send the particular issue to the jury, since none of these relations was to be found. *Lockwood v. Lockwood, supra; Gager v. Mathewson,* 93 Conn. 539, 107 Atl. 1 (1919).

WORKMEN'S COMPENSATION—INJURY TO EMPLOYEE COMMANDEERED IN EXERCISE OF MUNICIPAL POLICE POWER.—A taxicab driver, driving his employer's cab, was commandeered by a police officer to pursue another car. While in pursuit, a collision occurred which resulted in the death of the driver. Compensation was awarded the estate of the deceased by the State Industrial Commission under the Workmen's Compensation Law. *Held,* on appeal, that the order be affirmed. *Matter of Babington v. Yellow Taxi Corp.,* 250 N. Y. 14, 164 N. E. 726 (1928).

The basis of Workmen's Compensation statutes is said to be the social expediency of regarding losses to employees resulting from accidents of industry as cost items of production which should be borne by the employer who, in turn, will distribute them among a large group of the community. Laski, *Basis of Vicarious Liability* (1916) 26 YALE L. J. 105, 126. Recovery under such statutes is usually limited to losses "arising out of and in the course of employment." N. Y. WORKMEN'S COMPENSATION LAW (1922) art. 2, § 10. Under the doctrine of *respondeat superior,* which is based substantially upon the same theory, the test for imposing responsibility is whether there has been an unreasonable deviation from the course of duty of the employee. TIFFANY, AGENCY (Powell's ed. 1924) 105-110; Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 716, 724. Whether the employer could have foreseen this hazard is also a test in these cases. Smith, *op. cit. supra* at 727. Both of these tests were used in the instant case. As a basis for determining the limitations to be placed upon the employer's cost of doing business they are purely arbitrary. A rational conclusion would require consideration of the allocation of such losses—the frequency of such occurrences, the expediency of imposing the burden on the business and the ability of the business to bear the burden. Douglas, *Vicarious Liability and the Administration of Risk I* (1929) 38 YALE L. J. 584. The loss occurred during the exercise of the police power by the city. To impose such a loss on a business is to include in the cost of production an item which would not seem to belong there. Inasmuch as the employee was acting for the city at the time of the injury, compensation might be granted by the city. *Cf. Monterey County v. Rader,* 199 Cal. 221, 248 Pac. 912 (1926).